Supreme Court, U.S.
FILED

00 985 DEC 15 2000

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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

THANH DUC TRAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

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No.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The orders of the court of appeals (App., *infra*, 1a-2a) and the district court (App., *infra*, 3a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **Detention and removal of aliens ordered removed**
>
> **(a) Detention, release, and removal of aliens ordered removed**
>
> **(1) Removal period**
>
> **(A) In general**
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> **(2) Detention**
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.
>
> **(3) Supervision after 90-day period**
>
> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under

regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Vietnam. Alien file A25162813 (A-file) 82. He entered the United States as a refugee on January 27, 1981. *Ibid.* On September 1, 1982, he adjusted his status to lawful permanent resident as of January 27, 1981. *Ibid.*

On December 1, 1994, the INS served respondent with an order to show cause, charging respondent with being subject to deportation from the United States under 8 U.S.C. 1251(a)(2)(A)(iii) (1994), because he had been convicted of an aggravated felony, and under 8 U.S.C. 1251(a)(2)(B)(i) (1994), because he had been convicted of a controlled substance offense. A-file 84, 87. Those charges were based on respondent's April 8, 1993, conviction in the United States District Court for the Eastern District of New York for conspiracy to possess and distribute heroin, *id.* at 82, for which he was sentenced to 70 months' imprisonment. *Id.* at 63-64. Respondent had agreed to transport from California to New York three videotape covers containing heroin in exchange for a payment of $1,000, because he needed money. *Id.* at 98, 123. He later claimed that he did not know about the heroin and did not suspect that anything was wrong. *Ibid.*

At the time respondent agreed to transport the heroin across the country, he had been out of custody for only one month on parole from a sentence imposed for conviction on charges of attempted murder and assault with a firearm. A-file 99. Respondent had been convicted of those offenses in state court on March 21, 1988, and sentenced to eight years' imprisonment. *Id.* at 164, 165.

Respondent's attempted murder and assault with a firearm convictions arose out of an incident in which he

shot a man in 1984. A-file 123. Respondent has provided the INS with two different accounts of the incident. On one occasion, respondent claimed that he and a friend were drunk and traveling in a car when his friend told him to shoot a man in another vehicle because he was from a rival gang, and respondent did so. *Id.* at 123. On another occasion, respondent claimed that he shot the victim at the request of a friend who had identified the victim as the person with whom he had had an argument about a girlfriend, and that argument had led to a car chase and the crash of respondent's vehicle. *Id.* at 98. Respondent's two versions of the events both included the fact that, after the shooting, respondent fled the jurisdiction and lived as a fugitive for two years in Georgia before being apprehended by the police on a fugitive warrant. *Id.* at 98, 123.

While respondent was serving his federal drug trafficking sentence, the INS issued a detainer against him, A-file 213, and, on November 23, 1996, respondent was transferred to the custody of the INS, *id.* at 81, 89-90. On December 16, 1996, an immigration judge denied respondent's request to be released on bond pending his deportation proceedings. *Id.* at 156.

b. On February 10, 1997, an immigration judge found that respondent was deportable as charged and pretermitted his application for withholding of deportation (see 8 U.S.C. 1253(h) (1994); 8 U.S.C. 1231(b)(3) (Supp. IV 1998)), because respondent's conviction of an aggravated felony for which he was sentenced to more than five years' imprisonment rendered him ineligible for such relief. A-file 20-21, 52. The immigration judge ordered respondent deported to Vietnam. *Id.* at 21, 55. On August 26, 1997, the Board of Immigration Appeals dismissed respondent's appeal, and thus his deportation order became final. *Id.* at 9. The Board agreed with

the immigration judge that respondent "is ineligible for either asylum or withholding of deportation due to his conviction for conspiracy to possess and distribute heroin, for which he was sentenced to 70 months." *Ibid.*

c. On October 25, 1999, the INS requested travel documents for respondent from the consulate of Vietnam. A-file 112. The Vietnamese government has not responded to that request, and therefore the INS has been unable to effectuate respondent's removal. See App., *infra*, 3a.

The INS continued to detain respondent under 8 U.S.C. 1231(a)(6) (Supp. IV 1998). In November 1998, the INS conducted a review of respondent's custody status. After interviewing respondent, who had the assistance of counsel, the INS determined that respondent should remain in INS custody because of the danger he would pose if released. A-file 121-126. On June 28, 1999, the INS reviewed the records of respondent's custody status. *Id.* at 119-120. On August 4, 1999, the INS informed respondent that his custody status would be reconsidered, identified the factors that would be considered in making that determination, and afforded respondent the opportunity to submit whatever evidence he wished. *Id.* at 117-118. On October 22, 1999, the INS interviewed respondent, who had the assistance of counsel. *Id.* at 95-99. On November 17, 1999, the INS informed respondent that he would be continued in INS detention at that time because the INS was unable to determine that he would not be a danger to the community or a flight risk if released. *Id.* at 100. Respondent was informed that his custody status would be reviewed again in six months. *Id.* at 102. An INS headquarters review panel reviewed that custody decision and agreed with the determination to continue respondent in custody. The

review panel could not conclude that respondent would not pose a threat of danger to the community or a flight risk if released, citing the seriousness of respondent's offenses, an incident of institutional misconduct (fighting) while in INS custody, his lack of employment prospects, his lack of a suitable sponsor, and his past history of flight from law enforcement authorities. 1/28/00 Headquarters Post Order Custody Review 1-2.

2. a. Meanwhile, on August 13, 1998, respondent had filed a petition for habeas corpus relief under 28 U.S.C. 2241 in the United States District Court for the Eastern District of California, challenging the lawfulness of his continued detention. App., *infra*, 3a.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c. On April 21, 2000, the district court entered an order in this case granting respondent's habeas corpus petition and directing the INS to release respondent from custody subject to reasonable restrictions. App., *infra*, 4a. The district court summarily ruled that, under the court of appeals' decision in *Ma*, respondent was entitled to habeas relief. *Id.* at 3a-4a.

d. On September 19, 2000, the court of appeals entered an order summarily affirming the district court's judgment on the basis of its decision in *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16212
DC# CV-98-1568-DFL
Eastern California

TRANH DUC TRAN, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Filed: Sept. 19, 2000]

ORDER

Before: WALLACE, FERNANDEZ, and TALLMAN, Circuit Judges

Appellant's motion to stay proceedings in this appeal is denied. The Court denied appellant's prior motion to stay proceedings in its August 11, 2000 order.

A review of the record and appellant's response to the court's August 11, 2000 order to show cause why this appeal should not be summarily affirmed in light of *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3086 (U.S. July 5, 2000) (No. 00-38), indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment.

All other motions are denied as moot.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-98-1568 DFL JFM P

THANH DUC TRAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: Apr. 21, 2000]

ORDER

Petitioner is an individual in the custody of the Immigration and Naturalization Service (INS) proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner is a former lawful permanent resident who was ordered deported to Vietnam. This order became final on February 10, 1997. Petitioner has not been deported, but instead has remained in INS custody beyond the 90 day "removal period" set out in 8 U.S.C. § 1231, because the United States has no functioning repatriation agreement with Vietnam, and the Vietnamese government does not presently accept the return of its nationals from the United States.

On April 10, 2000, the United States Court of Appeals for the Ninth Circuit issued its decision in *Ma v. Reno*, No. 99-35976 (9th Cir. April 10, 2000). In that decision, the Court held that:

> the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period.

Id., slip op. at 3964. Under *Ma v. Reno*, Petitioner is entitled to habeas relief.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's application for a writ of habeas corpus is granted;

2. Respondent's request for a stay of release of Petitioner pending the Ninth Circuit's vote on whether to hear *Ma v. Reno en banc* is denied;

3. Respondent shall release Petitioner from incarceration, subject to such reasonable restrictions set forth in 8 U.S.C. § 1231(a)(3) that the Attorney General may place on Petitioner, by Wednesday, April 26, 2000, at 12:00 noon.

Dated: April 21, 2000.

/s/ DAVID F. LEVI
HON. DAVID F. LEVI
United States District
Judge